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No. 20,619

United States Court of Appeals
For the Ninth Circuit

HELEN FONG, also known as Helen
Poy, also known as Fong Hong May,
vs.
Appellant,

UNITED STATES OF AMERICA,
Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division

Honorable Fred M. Taylor, Judge for the District of Idaho,
Sitting by Special Assignment

APPELLANT'S REPLY BRIEF

STARK & CHAMPLIN,
By JOHN F. WELLS,
Financial Center Building,
Oakland, California 94612,
Attorneys for Appellant.

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The government's brief makes two arguments: (1) that Section 294(b) and not Section 297 states the applicable rule for the collection of interest where no bond is filed to stay collection of a jeopardy assessment; and (2) that in any event Section 297 authorizes the collection of interest on interest under the circumstances of this case. Neither argument is sound.

- A. SECTION 294(b) MAY AUTHORIZE COLLECTION OF INTEREST ON THE INTEREST INCLUDED IN A JEOPARDY ASSESSMENT WHERE NO BOND IS FILED TO STAY COLLECTION, BUT IF THAT ASSESSMENT DOES NOT BECOME FINAL, BUT IS REDETERMINED BY THE TAX COURT, THEN THE TAXPAYER'S ULTIMATE LIABILITY FOR INTEREST IS CONTROLLED BY SECTION 297.

As explained in appellant's opening brief, Section 297 (entitled "Interest in Case of Jeopardy Assessments") does not authorize the collection of compound interest for the period of time prior to the Tax Court decision redetermining a deficiency. The government, however, contends that Section 297 applies only to cases in which collection has been stayed by a bond and that Section 294(b) governs a case such as this where no bond was filed. But there is nothing in Section 297 which purports to limit its application to cases in which collection has been stayed by a bond. The government's brief argues that such a limitation must necessarily be implied from the language of Section 294(c) which expressly provides that Section 294(b) does not apply to amounts covered by a bond. (Appellee's Br., p. 16.) From this, the government infers that Section 294(b) *does* apply to amounts not covered by a bond. The government contends that Section 297 is thus superseded by Section 294(b) where no bond is filed; otherwise the sections would overlap.

There is, however, a better construction of these sections (App. Op. Br., pp. 12-14)—one which also eliminates any overlapping or inconsistency but which

at the same time avoids making the taxpayer's dollar liability for interest turn on such irrelevant factors as the inability to post a bond or the Commissioner's decision (not reviewable) to make a jeopardy assessment. Section 294(b) permits collection of interest on assessed amounts (which include interest to date) from the date of the notice and demand following the assessment (except where collection is stayed by a bond). Should the assessment become final because the taxpayer does not pursue his remedy in the Tax Court, then the result is the same for jeopardy and non-jeopardy cases whether or not a bond is filed. That is, interest on assessed interest begins after the notice and demand following the assessment. But if the assessment is redetermined by the Tax Court, Sections 297 and 273(i) become applicable. Section 297 deals solely and exclusively with "the amount collected under Section 273(i)." Section 273(i) applies only "... when the amount which should have been assessed has been determined by a decision of ..." the Tax Court. In that case, Section 297 authorizes interest on assessed interest only during the period following the Tax Court decision. Any amount which had been collected while the case was pending in the Tax Court in excess of the amount which the Tax Court determined should have been assessed (which would include any interest which may have been collected pursuant to Section 294(b)) is required by Section 273(i) to be credited or refunded to the taxpayer. Again, the result is the same for jeopardy

and non-jeopardy cases, and whether or not a bond was filed.

In other words, the factor which determines whether Section 294(b) or 297 applies in a jeopardy case is whether or not the assessment is redetermined by the Tax Court, and not, as the government argues, whether or not a bond is filed.

Part of the difficulty in interpreting and reconciling these confusing sections of the 1939 Code undoubtedly stems from the apparent assumption of the draftsman that, in the case of a jeopardy assessment, the only amounts not immediately collected would be those amounts the collection of which had been stayed by the posting of a bond. Both Section 294(c) and the authorization in Section 273(i) for collection of any "unpaid portion, the collection of which has been stayed by the bond" seem to have been motivated by that philosophy. Yet Congress must have intended the same treatment respecting amounts unpaid because the Commissioner has not enforced payment as amounts unpaid because a bond was posted. Section 273(i) must apply equally to both or there is no statutory authority for collecting amounts which are not stayed by a bond, but which are nevertheless uncollected at the time of the decision in the Tax Court.

The government's contention that Section 294(b) applies where collection is not stayed by a bond, and Section 297 only when a bond is not filed, seems inescapably wrong. The taxpayer's ultimate liability for

interest following a Tax Court decision is governed by Section 297.

**B. SECTION 297 PERMITS COLLECTION OF INTEREST ON
INTEREST IN THE CASE OF A JEOPARDY ASSESSMENT
ONLY AFTER REDETERMINATION OF THE DEFICIENCY
IN THE TAX COURT.**

The government next argues that even if Section 297 governs interest on jeopardy assessments where no stay bond has been posted, interest on interest is still collectible under that section. This contention too is invalid.

Both the government (Appellee's Br., p. 17) and the appellant (App. Op. Br., p. 10) agree that the interest to be collected pursuant to Section 297 is interest on the amount of the deficiency which should have been assessed as determined by the Tax Court. Whether or not it has jurisdiction to do so, the Tax Court does not and did not in this case determine the amount of interest which should have been assessed. This is nowhere more clearly shown than in the government's brief, where in its summary of the Tax Court decision the government says: "The Tax Court made no decision as to the amount of interest assessable. . ." (Appellee's Br., p. 6.) Therefore, the interest provided for by Section 297 on the amount collected under Section 273(i) ("the amount which should have been assessed as determined by the Tax Court") is only interest on the amount of the deficiency and penalties. It cannot include interest on interest which was not determined by the Tax Court

to have been an amount which should have been assessed.*

The government argues that the Tax Court *does* have jurisdiction to determine the amount of interest which should have been assessed (citing *Riss v. Commissioner*, 45 T.C. No. 21, a recent Tax Court case which relies on the *Ginsburg* case) and that, therefore, “. . . the amount fixed by the Tax Court, upon which interest is to be calculated pursuant to Section 297, includes deficiency interest . . . and thus, the interest imposed on this amount, . . . results in a compounding of interest like the result which is obtained under Section 294(b).” (Appellee’s Br., p. 20.) This statement plainly involves a non sequitur. It does not follow from the existence of jurisdiction to determine interest that “the amount fixed by the Tax Court . . . includes deficiency interest.” In fact, the Tax Court decision did *not* include interest.

*The Tax Court decision in this case resulted from a compromise settlement made pursuant to stipulation between appellant’s counsel and the government. (R. 42:18-24.) During negotiations leading to this settlement, appellant’s counsel offered to include the precise question of interest on interest now being litigated, and would have preferred to settle this question along with the amount of tax and penalty due. However, the government’s counsel took the position that this was impossible because the Tax Court would not accept jurisdiction of any question involving interest, and had repeatedly so held. (See cases cited in Appellant’s Opening Brief, pp. 8-9.) Accordingly, the case was settled without any interest determination. That the Tax Court now appears to have reversed itself on this question (*Riss & Company, Inc. v. Commissioner*, 45 T.C. 21 (Dec. 1965), cited at page 19 of the Appellee’s Brief), can have no bearing on *this* case, because it is very clear that in *this* case the Tax Court did *not* include interest in its decision. Indeed, so far as we know, the *Riss* case is the first case in which the Tax Court has ever undertaken to determine an interest question.

Contrary to the government's brief, appellant's position does not depend upon the Tax Court's lack of *jurisdiction* to determine interest, but rather on its failure to exercise jurisdiction for whatever reason.

The appellant's position is further supported by the fact that under the government's construction of Section 297, there would be a double compounding of interest. Section 297 provides that:

. . . in the case of the amount collected under §273(i) [the amount which the Tax Court determined should have been assessed] there shall be collected . . . interest . . . upon such amount from the date of the jeopardy notice and demand to the date of the notice and demand under §273(i) [after judgment in the Tax Court].

Section 297 further provides:

If the amounts included in the notice and demand from the collector under 273(i) [which includes the interest provided for above] is not paid in full within ten days after such notice and demand, then there shall be collected . . . interest on the unpaid amount [which includes the interest provided for above] from the date of the notice and demand until it is paid.

If, as the government contends, interest is included in "the amount collected under Section 273 (i)" the language first above quoted imposes interest on interest from the time of the jeopardy assessment to the decision in the Tax Court. The language quoted last above then imposes interest on interest on interest, or double compound interest, after that time. The

government does not contend that it can exact doubly compounded interest, but that is the logical result of its position here. On the other hand, if as appellant contends, the amount "collected under Section 273 (i)" does not include interest, the result is symmetrical with that in the case of non-jeopardy assessments where interest on interest does not begin until after decision in the Tax Court.

C. TO SUSTAIN THE GOVERNMENT'S INTERPRETATION OF SECTION 297 WOULD RESULT IN THE DENIAL OF DUE PROCESS OF LAW TO APPELLANT.

The government argues (Appellee's Br., pp. 12-13) that interest on interest is not to be regarded as a penalty, but as compensation for the use of money because of delay in payment of tax. Appellant concedes that the government is entitled to compensation for delay in the payment of any deficiency, and to compensation for delay in the payment of interest thereon, *after* judgment in the Tax Court, when the assessment becomes final. What appellant contests is the government's assertion that it can exact an additional sum of interest merely by making a jeopardy assessment, when admittedly the decision to make a jeopardy assessment lies in the commissioner's unreviewable discretion. It is appellant's contention that to allow the commissioner to impose such additional interest by his unreviewable decision to make a jeopardy assessment is to deprive appellant of property without due process of law in violation of the Fifth Amendment of the United States Constitution.

The cases cited by the government (Appellee's Br., p. 13) to the effect that interest on delayed tax payments is not a penalty are not in point. They speak to the validity of interest on a deficiency, which appellant concedes, and not to the validity of the additional unreviewable imposition of interest on interest.

CONCLUSION

Appellant has shown that the complicated and confusing statutory provisions here involved can be interpreted and applied in a sensible and logical way that will avoid the harsh, inequitable, and probably unconstitutional result that was reached in the District Court. That court's judgment should be reversed.

Dated, Oakland, California,
July 11, 1966.

Respectfully submitted,
STARK & CHAMPLIN,
By JOHN F. WELLS,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. WELLS,
Attorney for Appellant.

